82-964

No.

Office-Supreme Court, U.S.
FILED
DEC 6 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

GEORGE W. DUNNE, et al.,

Petitioners,

vs.

CARL R. HANSEN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD M. DALEY,
State's Attorney of
Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5440,
Attorney for Petitioners.

JANE CLARK CASEY,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

HENRY A. HAUSER,
Assistant State's Attorney,
Deputy Chief, Civil Actions Bureau,
IRIS E. SHOLDER,
Assistant State's Attorney,
WILLIAM J. HARTE,
111 W. Washington Street,
Chicago, Illinois 60602,
Of Counsel.

QUESTIONS PRESENTED FOR REVIEW

Whether the federal courts may intrude into local government affairs by revising an apportionment plan for election of local officials, where the local government has already enacted a reapportionment plan with only *de minimis* variation from numerical equality, and where the district court's finding of a *prima facie* case is merely based on the possibility of slightly reducing that variance.

Whether the district court may intervene in local government affairs by substantially increasing the size of a local legislative body, where no *prima facie* case of vote dilution has been shown, and where, moreover, any variance is justified by local government policies and concerns.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ... i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT:

I.

THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT BY APPLYING THE WRONG STANDARD FOR EVALUATION OF APPORTIONMENT FOR THE ELECTION OF LOCAL GOVERNMENT OFFICIALS, AND CONSEQUENTLY RESULTS IN UNWARRANTED INTRUSION OF THE FEDERAL COURT INTO LOCAL GOVERNMENT AFFAIRS 8

II.

THE QUESTION IS NOT MOOT BECAUSE THE FUNCTIONING AND SIZE OF THE COOK COUNTY BOARD AND ITS APPORTIONMENT ARE AFFECTED ON AN ONGOING BASIS BY THE DECISION OF THE COURT BELOW 15

CONCLUSION 16

APPENDIX:

A-1. MEMORANDUM OPINION AND ORDER OF DISTRICT COURT 1a

A-2. OPINION OF COURT OF APPEALS ... 9a

A-3. ORDER DENYING REHEARING 18a

TABLE OF AUTHORITIES

Cases

Abate v. Mundt, 403 U.S. 364 (1971) 12
Avery v. Midland County, Texas, 390 U.S. 474 (1968) 9
County of Cook v. City of Chicago, 311 Ill. 234 (1924) 13
Gaffney v. Cummings, 412 U.S. 735 (1973) 9-12,15
Kanellos v. Cook County, 53 Ill.2d 161 (1972) 13
Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 9,11
Preiser v. Newkirk, 422 U.S. 395 (1975) 15
Reynolds v. Sims, 377 U.S. 533 (1964) 9
Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972) 12
Upham v. Seamon, _____ U.S. _____, 102 S.Ct. 1518 (1982) 9
White v. Crowell, 434 F.Supp. 1119 (W.D. Tenn. 1977) 11
White v. Regester, 412 U.S. 755 (1973) 11
White v. Weiser, 412 U.S. 783 (1973) 9

Other Authorities

U.S. Const., Art. I, §2 2,9,11
U.S. Const., Amend. XIV, §1 ..... 3,9, 11,14
Ill. Const. 1970, Transition Schedule, §5(b) 3,13
Ill. Const. 1970, Art. VII, §3(c) 13
Ill. Const. 1870, Art. X, §7 13

In the Supreme Court of the United States

October Term, 1982

GEORGE W. DUNNE, et al.,

Petitioners,

vs.

CARL R. HANSEN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, George W. Dunne and the other city members of the Cook County Board of Commissioners,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on June 10, 1982.

[1] In addition to George W. Dunne, the petitioners are: city Commissioners Matthew Bieszczat, Mildred Casey, Matt Rupa, Frank W. Chesrow, Ruby Ryan, John H. Stroger, Jr., Irene C. Hernandez, Jerome Huppert, and Martin Tuchow. In addition to Carl R. Hansen, the respondents are: suburban Commissioners Bernard Carey (replaced Joseph Tecson), Mary M. McDonald, Ronald R. Larson, Harold L. Tyrrell, and Joseph I. Woods. Stanley Kusper, Clerk of the Circuit Court of Cook County, was a defendant below.

When this case was initially filed in 1973, as *Sutton v. Dunne*, the plaintiffs were: James W. Sutton, Jr., Rosemary Wiedl, and James E. Newquist. The defendants in the 1973 case were: Commissioners George W. Dunne, Matthew W. Bieszczat, Charles S. Bonk, Charles F. Chaplin, Frank W. Chesrow, William M. Erickson, Charles J. Grupp, Jr., William Harvey, Jerome Huppert, Lillian Piotrowski, Ruby Ryan, John H. Stroger, John J. Touhy, Joseph I. Woods, and Floyd T. Fulle.

OPINIONS BELOW

The opinions of the District Court are reported as *Sutton v. Dunne*, 365 F. Supp. 483 (N.D. Ill. 1973) and 529 F. Supp. 312 (N.D. Ill. 1981). The later case, the subject of this petition, is included as an Appendix (A-1) to the petition. The opinion of the Court of Appeals is not yet reported, and is included as an Appendix (A-2) to the petition.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was rendered on June 10, 1982. The Petition for Rehearing and Suggestions in Support of Rehearing *En Banc* was denied on October 5, 1982. (A-3) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art. I, §2:

> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const., Amend. XIV, §1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Const. 1970, Transition Schedule, §5(b):

> (b) In Cook County, until (1) a method of election of county board members different from the method in existence on the effective date of this Constitution is approved by a majority of votes cast both in Chicago and in the area outside Chicago in a county-wide referendum or (2) the Cook County Board by ordinance divides the county into single member districts from which members of the County Board resident in each district are elected, the number of members of the Cook County Board shall be fifteen except that the county board may increase the number if necessary to comply with apportionment requirements. If either of the foregoing changes is made, the provisions of Section 3(a) of Article V shall apply thereafter to Cook County.

STATEMENT OF THE CASE

This case involves a challenge to the apportionment of elected members of the Board of Commissioners of Cook County, Illinois. Cook County consists of two multi-member districts: (1) that part of Cook County located within the City of Chicago (hereinafter "city") (2) that part of Cook County outside the City of Chicago (hereinafter the "suburbs"). The county board consisted of fifteen members, ten elected from the city, five from the suburbs, for over 100 years, until the district court's order in this case in 1973, which increased the Board to 16.

Jurisdiction of the federal courts was invoked pursuant to the Fourteenth Amendment, and 42 U.S.C. §1983. In its order of December 23, 1981, the district court (1) ordered the Board of Commissioners of Cook County to reapportion itself so that commencing with the board elected on November 2, 1982, the voters of the City of Chicago will elect ten members of the board, and the voters residing in Cook County outside the City of Chicago will elect seven members of the board; and (2) ordered the board to adopt an ordinance so reapportioning itself within 15 days. The additional two members of the Board were elected during the regular 1982 elections, on the basis of the court's 10-7 apportionment plan, but the court on Jan. 6, 1982, stayed the part of his order requiring the Board to actually enact the ordinance.

The 1973 Case

In 1973 certain suburban voters asserted that they were denied appropriate representation on the board based on population figures established by the 1970 Decennial census. The district court granted summary judgment in the suburban voters' favor in *Sutton v. Dunne*, 365 F. Supp. 483 (N.D. Ill. 1973) and ordered that an additional member be elected by suburban voters and seated on the board. On October 15, 1973 the board adopted an ordinance implementing the district court's reapportionment plan, and the 1974 and 1978 board elections were held on the basis of that ordinance. (A-1, p. 1a-2a)

The 1981 Case

On November 2, 1981 the board adopted an ordinance, amending the October 15, 1973 ordinance, to provide that nine commissioners be elected from the city, and six from the suburbs. This change brought the apportionment for election of the Board into closer conformity with population statistics reflected by the 1980 census, which were no longer accurately reflected by the 1973 plan. (A-1, p. 2a)

Shortly thereafter, on November 24, 1981 the suburban members, as voters and elected members of the board, filed a motion for leave to file a cross-claim against the city members of the board. (Movant's Motion for Leave) The cross-claim challenged the reduction of board membership required by the November 2, 1981 ordinance on the following grounds:

(1) The ordinance constituted a violation of the district court's order of October 11, 1973 setting the board's membership at 16,

(2) the ordinance constituted a violation of the suburban members' rights under the Fourteenth Amendment by diluting suburban voters' representation on the board,

(3) the ordinance violated the Illinois Constitution, Transition Schedule, Section 5(b).

The cross-defendants, who were the elected city members of the board in their official capacity, filed objections to the cross-claim on December 1, 1981. On December 7, 1981 the proposed cross-claim was withdrawn, and a "Motion to Modify Decree" was filed by the suburban members.

The "Motion to Modify Decree" asserted the existence of the October 11, 1973 order and the November 2, 1981 ordinance, and alleged a violation of suburban voters' Fourteenth Amendment rights based on the population figures generated for the county by the 1980 decennial census. Based on the foregoing, the suburban members asserted that the correct allocation of seats on the board should be nine to the city and seven to the suburbs. The suburban members also asserted that the reduction of board seats from sixteen to fifteen, accomplished by the November 2, 1981 ordinance was violative of the Illinois Constitution. (Movants' Motion to Modify)

On December 18, 1981 the County Official Defendants' Answer and Affirmative Defenses to the Motion was filed. (Deft. Answer) The answer denied the various legal conclu-

sions and allegations set out in the motion to modify and asserted:

1. That the board had complied with the district court's order of October 11, 1973 by adopting an ordinance in conformity with that order; and that the November 2, 1981 ordinance was not a violation of the prior order.

2. That the reported population figures alleged by the suburban members were not adjusted for the known undercount of minority groups.

3. That the motion to modify failed to state grounds or claims upon which relief could be granted, the differential between a 15 member board as against a 17 member board being so minimal that no constitutional claim could be stated.

4. That the motion failed to assert any invidious discrimination resulting from the miniscule disparity on account of the 15 member board.

5. That the suburban members lacked standing to bring the claims in their official capacity.

6. That the addition of commissioners would cost the county approximately $80,400 per commissioner, per year.

No evidence was taken, but the district court did conduct a series of pre-trial conferences between the parties.

Because the Census Bureau had not yet estimated percentages of the undercount of the 1980 census, the district court used the 1980 figures, adjusted by the percent of undercount estimated for the 1970 census. These figures, concededly inaccurate, would be more accurate than the raw 1980 statistics. (A-1, p. 2a-3a)

The statistics, so adjusted, are as follows (A-1, p. 3a):

City of Chicago

	1980 Population	Adjustment	1980 Adj. Population
White	1,143,426	1.9%	1,165,151
Nonwhite	1,961,635	7.7%	2,004,960
	3,005,061		3,170,131

Suburban Cook County

White	1,988,406	1.9%	2,026,185
Nonwhite	259,723	7.7%	279,720
	2,248,129		2,305,905

Total Cook County = 5,476,036

1980 Adjusted Population

City	3,170,131	=57.89%
Suburban	2,305,905	=42.11%
	5,476,036	

Based on these figures, the 9-6 apportionment enacted by the Board would result in a 2.11% overrepresentation for the city and a 2.11% underrepresentation for the suburbs. The court's own suggestion of a 10-7 formula would slightly reduce the variance to ±.93%.

On December 22, 1981 the district court issued its "Memorandum Opinion", and the next day, its order requiring the membership of the board to be increased to seventeen, ten members elected from the city, seven from the suburbs. (A-1) The district court ruled that the differential of ±2.11% between the suburban voters and the city voters was sufficient to establish a *prima facie* case of Fourteenth Amendment violation. The court then ruled that the costs to the county of additional members to the board, $80,400 per year, per additional member, was not an adequate justification for the differential. (A-1, p. 5a)

The Court of Appeals affirmed, holding that the possibility of reducing the variance warranted judicial intervention in the apportionment of the Cook County Board, and further that the historical and economic factors urged by the city members did not justify the Board's plan. Petitioners now seek certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT BY APPLYING THE WRONG STANDARD FOR EVALUATION OF APPORTIONMENT FOR THE ELECTION OF LOCAL GOVERNMENT OFFICIALS, AND CONSEQUENTLY RESULTS IN UNWARRANTED INTRUSION OF THE FEDERAL COURT INTO LOCAL GOVERNMENT AFFAIRS.

This case is of exceptional importance because the decision below squarely conflicts with this Court's consistently reiterated declaration of the parameters of permissible federal judicial intervention in reapportionment for state political subdivisions. As the dissenting opinion in this case recognized, this Court has repeatedly emphasized that judicial intervention is unwarranted and impermissible, where reapportionment by a state or local government legislative body results in only *de minimis* variation from numerical equality.

Nevertheless, the panel majority in this case has held that a variance of only ±2.11% is a "substantial" variation, and that judicial intervention to reduce the variance to ±.93% by adding two commissioners was appropriate. The majority reached its conclusion not by addressing the variance itself, but by merely postulating that a different apportionment could come closer to numerical equality. This purported analysis not only begs the very question at issue, but also erroneously relies upon the theory that

judicial intervention is always warranted if a numerical deviation can be reduced. This principle is applicable, however, only to Congressional reapportionment under Article I, Section 2 of the United States Constitution (*Kirkpatrick v. Preisler*, 394 U.S. 596 (1969), relied upon by the majority), and not under the Fourteenth Amendment.

The panel majority thus relied upon the wrong standard. Federal court intervention in reapportionment cases involving the election of local officials is permissible only if a *prima facie* case of an equal protection violation is demonstrated. As the dissenting opinion so aptly states, there is a strong presumption in favor of a legislatively determined reapportionment. *Upham v. Seamon*, _____ U.S. _____, 102 S.Ct. 1518, 1521 (1982); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *White v. Weiser*, 412 U.S. 783, 795 (1973). The panel majority in the instant case has erroneously equated the possibility of reducing a deviation with the existence of a *prima facie* case of vote dilution. Such a conclusion departs from this Court's consistent holdings to the contrary.

The Fourteenth Amendment requires that the election of state and local legislative officials be conducted with districts apportioned substantially according to population. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County, Texas*, 390 U.S. 474 (1968). Mathematical exactness, however, is both unworkable and unnecessary. Consequently, this Court declared in *Gaffney v. Cummings* that:

> minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. 412 U.S. at 745.

This Court recognized that:

> state reapportionment is the task of . . . those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection

Clause when only minor population variations among districts are proved. 412 U.S. at 751.

In *Gaffney* a *prima facie* case of a violation of equal protection was not established, either by the existence of numerical deviations, or by the possibility of formulating a plan with lower deviations. 412 U.S. at 740-741. The unmistakable mandate of *Gaffney* is that even if the State's plan is not numerically the closest to the ideal population distribution, the courts should not intervene if the allocation has been made within "tolerable limits." 412 U.S. at 754.

Under the plan enacted by the Cook County Board, 15 commissioners were to be divided 9 and 6 between Chicago and suburban Cook County with a variance from population equality of only 2.11% each way. The district court plan would add two commissioners to the Board, splitting it 10 and 7, with a variance each way of .93%. Both computations are based upon 1980 census figures, modified to reflect the percentage of the population undercount which had been estimated for the 1970 census.

The percentage variation under the Board's plan is *de minimis* on its face, as found in the dissenting opinion, and judicial intervention was therefore unwarranted. Moreover, the majority incorrectly states in a footnote that "neither party challenges the accuracy" of the figures upon which these percentages are based. (A-2, n. 1, p. 11a) On the contrary, the district court merely used the approximations of adjusted figures, which it correctly asserted would be "closer to the actual figures than the raw data." (A-1, p. 2a-3a) As petitioners argued in their brief below, these figures are the most accurate available, but they are still inaccurate, exacerbating the inappropriateness of judicial intervention when the percentages are so close.

This Court in *Gaffney* emphasized the unreliability of any census count, holding that therefore minor deviations cannot be deemed significant:

> it makes little sense to conclude from relatively minor "census population" variations among legislative districts that any person's vote is being substantially diluted. The "population" of a legislative district is just not that knowable to be used for such refined judgments. 412 U.S. at 746.

Indeed, this Court expressed its:

> doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decision making in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature. 412 U.S. at 749.

Moreover, deviations substantially greater than that in the instant case have been held to be *de minimis*. *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973). No case in which a plan with a variation similar to the instant case was invalidated has been found by either party, or either court, except where the plan was rejected because it increased the deviation over the previous plan, and did so for impermissible reasons. *White v. Crowell*, 434 F.Supp. 1119 (W.D. Tenn. 1977).

Contrary to the holdings of this Court in *Gaffney* and its progeny, the panel majority has created a totally new constitutional principle, purporting to distinguish, on a constitutional plane, between reapportionment plans involving multiple districts and two districts. It then holds that "the Board's 1981 plan, although perhaps an insubstantial deviation in a multi-district case, is not *de minimis* in this two district case." (A-2, p. 13a) The suggested basis for this distinction is the alleged ease in reapportionment, by changing the number of officials, in a two district plan. The majority, which, significantly, has relied upon *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), thus inappropriately considers whether a variance is "avoidable," (A-2, p. 12a) which is relevant in apportionment cases under Article 1, Section 2, but not under the Fourteenth Amendment. The

majority's analysis directly conflicts with *Gaffney* and its progeny, which explicitly stressed that the federal courts should not get involved in reapportionment litigation, merely because a plan which may be "marginally 'better' when measured against a rigid and unyielding population-equality standard" is produced. *Gaffney*, 412 U.S. at 751.

Furthermore, the panel majority not only incorrectly found a ±2.11% variance to be substantial, but also rejected the Cook County Board's justified and presumptively valid setting of the size of its own membership. *Abate v. Mundt*, 403 U.S. 182 (1971). The dissenting opinion, correctly noting that the majority examined "only the ability to reduce the deviation," emphatically states:

> This decision fails to give adequate deference to the reasoned and good faith judgment of the Board and represents unjustified and unnecessary meddling by a federal court in the affairs of a local governmental body. (A-2, p. 17a, Grant, J. Dissenting)

The dissent further disagreed with the majority's finding that the change in the Board's composition from 15 to 17 is only minor and therefore permissible. In *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 201-202 (1972), this Court emphasized that the decision as to the size of a legislative body is initially a local government matter. Disapproving of a substantial reduction of the Minnesota legislature, this Court declared that:

> We know of no federal constitutional principle or requirement that authorizes a federal reapportioning court to go as far as the District Court did and, thus, to by-pass the State's formal judgment as to the proper size of its legislative bodies . . . We have found no district court decision that has employed such radical surgery in reapportionment, *Beens* 406 U.S. at 198.

Naturally, the foregoing limitation upon "radical surgery" applies as well to the unwarranted "cloning" of the County Board members accomplished by the district court below. In this situation, where County Board

membership is increased by more than 13%, similar considerations are involved; and the district court exceeded the legitimate scope of its authority. The trifling differential asserted by the district court as authority for its interference into the County's affairs surely cannot, when viewed with the preponderating historical, political, and economic factors, be considered to constitute a legitimate exercise of federal authority in this case, since there is no showing of a disciminatory purpose to contravene the Fourteenth Amendment rights of the suburban members. This substantial increase has been effected by the court, despite the long historical precedent of a 15 member Board, despite the presumption of that number, as defined in the 1970 Illinois Constitution (Transition Schedule, Section 5(b)),[2] and despite the valid consideration of the costs of including additional officials.[3]

---

[2] For more than 100 years the County of Cook has consisted of a fifteen member board having the duty and responsibility to carry on various aspects of the county's business. *County of Cook v. City of Chicago*, 311 Ill. 234, 240-42, 246 (1924), powers pre-1970 Const.; *cf. Kanellos v. Cook County*, 53 Ill.2d 161, 166 (1972), powers post-1970 Const.

The 1870 Illinois Constitution, Art. X, §7 provides:

> "The county affairs of Cook County shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the City of Chicago and five from towns outside of said city, in such manner as may be provided by law."

The 1970 Constitution, Art. VII, §3(c) provides:

> "Members of the Cook County Board shall be elected from two districts, Chicago and that part of Cook County outside Chicago. . ."

Transition Schedule, §5(b) provides:

> "In Cook County. . . the number of members of the Cook County Board shall be fifteen except that the county board may increase the number if necessary to comply with reapportionment requirements.

[3] The district court acknowledged that the effect of adding a commissioner to the County Board would increase the budget by $80,400 per year per additional member. The cost of the court's order to the county over the decennial is therefore in excess of $1.6 million. This increase

The panel majority has erred in affirming the unwarranted judicial intervention in this case. The Board acted to reapportion itself to reflect new population statistics, and that repportionment resulted in only *de mimimis* variances. Neither the district court nor the panel majority has accorded the requisite deference to this local government's appropriate determination of its own affairs.

A dangerous new precedent has been set, that federal courts may substitute their judgment for that of local governments whenever the court or the movant propose a plan purportedly closer to population equality. The deci-

---

[3] (Continued)
comes at a time when the county is subject to the following financial stress factors:

Federal Revenue Sharing—12% cutback from the Federal Government in the County's Revenue Sharing allocation totalling $2.5 million.

Personal Property Replacement Tax—Recent legislation passed by the State Legislature may reduce the County's allocation by $2 million.

Medically Indigent Hospitalization Reimbursements—Federal and State cutbacks in the area of hospital reimbursements will be an estimated $10 million.

Recorder of Deeds - Poor housing market	
1979 Actual Revenue	$10,422,000
1982 Estimated	7,000,000
	-3,422,000
Building & Zoning - Poor housing market	
1979 Actual Revenue	$ 823,784
1982 Estimated	350,000
	- 473,784
Retail Sale of Motor Vehicles—	
Tax-High Interest Rates	
1979 Actual Revenue	$ 4,795,950
1982 Estimated	3,000,000
	- 1,795,950

Defendants' Answer,
Exhibit D - 30 -

sion below directly conflicts with this Court's enunciations, in *Gaffney* and subsequent cases, of the parameters of permissible federal court intervention in cases under the Fourteenth Amendment involving local governmental apportionment, especially where the size of a legislative body is modified. Consequently, these conflicts justify the grant of certiorari to review the judgment below.

II.

THE QUESTION IS NOT MOOT BECAUSE THE FUNCTIONING AND SIZE OF THE COOK COUNTY BOARD AND ITS APPORTIONMENT ARE AFFECTED ON AN ONGOING BASIS BY THE DECISION OF THE COURT BELOW.

Even though the election of the additional Commissioners of Cook County has already occurred, the case is not moot. The additional membership of the Board of Commissioners, and the apportionment between the city and suburbs, will be in continuing effect for the next ten years, until new census statistics make a re-evaluation necessary. Consequently the functioning of the local government of Cook County will continue to be affected by the decision below, and the controversy remains both actual and substantial. *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975).

The existence of this actual and substantial controversy warrants issuance of the writ to review the decision below.

CONCLUSION

For the reasons stated in this Petition, petitioners pray that this Honorable Court grant a writ of certiorari to review the decision below.

Respectfully submitted,

RICHARD M. DALEY,
State's Attorney of
Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5440,
Attorney for Petitioners.

JANE CLARK CASEY,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

HENRY A. HAUSER,
Assistant State's Attorney,
Deputy Chief, Civil Actions Bureau,
IRIS E. SHOLDER,
Assistant State's Attorney,
WILLIAM J. HARTE,
111 W. Washington Street,
Chicago, Illinois 60602,
Of Counsel.

APPENDIX A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES W. SUTTON, et al.,
Plaintiffs,

v.

GEORGE W. DUNNE, et al.,
Defendants.

NO. 73 C 2021

MEMORANDUM OPINION

I.

In 1973, the plaintiffs brought an action under 42 U.S.C. §1983 seeking reapportionment of the membership of the Board of Commissioners of Cook County. When the suit was brought, the Board had fifteen members, ten elected from the City of Chicago and five from suburban Cook County. That apportionment gave the city electorate 66.67% of the voting power on the Board and the suburban electorate 33.33%. According to the 1970 Census Bureau figures for Cook County, after adjustment by the Census Bureau, the city's population was only 61.80% of the county total, and the suburbs' population was 38.20%. Under the 10-5 configuration of the Board, therefore, the city was overrepresented by 4.87%, and the suburbs were underrepresented by 4.87%. Accordingly, the total deviation was 9.74%. We found this disparity unconstitutionally diluted the voting rights of suburban voters and ordered that, commencing with the Board to be elected on November 5, 1974 and for subsequent elections, defendants increase the

size of the Board to sixteen members, ten to be elected by the city and six by the suburbs. *Sutton v. Dunne*, 365 F.Supp. 483 (N.D. Ill. 1973).

On November 2, 1981, recognizing population changes indicated by the 1980 census, the Board passed an ordinance decreasing the size of the Board to fifteen members, nine to be elected by the city (one less than previously) and six by the suburbs (the same number as previously). With that apportionment, 60% of the Board members would be elected from the city and 40% from the suburbs.

The movants request that we modify our 1973 order to reflect population changes in the last decade. In addition, they contend that, even after the decrease in city representation accomplished by the recent ordinance, the suburbs are still substantially underrepresented. They claim that the total deviation is 5.87% and ask that the number of members on the Board be restored to sixteen—nine to be elected by the city voters, seven by suburban voters—or to seventeen—ten to be elected by the city, seven by the suburbs.

The deviation from equality is not 5.87% as the movants contend. In calculating the deviation, they have used the raw population figures, unadjusted to reflect the percentage of the population not counted. Their figures, therefore, are probably inaccurate and cannot form the basis for our analysis of the Board's apportionment plan.[1]

We do not have accurate adjusted figures, however, since the Census Bureau has not yet estimated what percentage of the population was undercounted in the 1980 census. Our 1973 decision was reached after the Census Bureau had released its estimates of undercounts for the 1970 census. At that time, we adjusted the raw data to reflect the estimated 1.9% undercount for white persons and the estimated 7.7% undercount for nonwhite persons. Historically, the Census Bureau has adjusted its Cook County raw figures in previous censuses by comparable amounts.

Accordingly, it is reasonable to use that same readjustment formula in calculations for the 1980 census. Although the figures may later prove slightly inaccurate, based on previous experience they will be closer to the actual figures than the raw data.[2]

City of Chicago

	1980 Population	Adjustment	1980 Adjusted Population
White	1,143,426	1.9%	1,165,151
Nonwhite	1,861,635	7.7%	2,004,980
	3,005,061		3,170,131

Suburban Cook County

	1980 Population	Adjustment	1980 Adjusted Population
White	1,988,406	1.9%	2,026,185
Nonwhite	259,723	7.7%	279,720%
	2,248,129		2,305,905

Total Cook County 5,476,036

1980 Adjusted Population

White	3,170,131	=	57.89%
Suburban	2,305,905	=	42.11%
	5,476,036		

The County Board reapportionment under the recently adopted ordinance of nine seats to the city, six to the suburbs, gives the city, which has 57.89% of the population, 60% of the votes on the Board which is an overrepresentation of 2.11%. Suburban Cook County, which has 42.11% of the population would have 40% of the votes on the Board which is an underrepresentation of 2.11%. The total deviation is therefore 4.22%. On a sixteen member Board with a 9-7 apportionment, the suburbs would have 43.75% of the votes and be overrepresented by 1.64%, while the city would be underrepresented in a like amount. The total deviation would therefore be 3.28%. On a seventeen member board with a 10-7 apportionment, the suburbs would have 41.18% of the votes and be underrepresented by .93% and the city overrepresented by the same amount. The total deviation would be only 1.86%. It is clear, therefore, that the 9-6 formula adopted by a ma-

jority of the County Board is the least representative of the three possible apportionments, while the 10-7 formula is the most representative.

II.

The Supreme Court requires that persons challenging an apportionment plan adopted by a state or local legislative body prove a prima facie equal protection violation; only after a prima facie case is established is the state required to present adequate justifications for the plan. *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973). Whether a prima facie case has been made depends upon the size of the deviations. If the deviations are so small that no prima facie case has been established, the state does not have to justify the deviations and the existence of other plans with lower deviations is not conclusive. 412 U.S. at 740-41.

Although the Supreme Court has, in cases involving state or city-wide apportionments with multiple districts, held higher deviations than those at isssue in this case to be within constitutional limitations, *see White v. Regester*, 412 U.S. at 764 (1.82% average deviation; 9.9% maximum deviation); *Gaffney v. Cummings*, 412 U.S. at 751 (2% average deviation; 8% maximum deviation); *see also Perry v. City of Opelousas*, 375 F.Supp. 1170 (W.D.La. 1974) (2.1% average deviation; 6.2% maximum deviation), we hold that the 2.11% average and the 4.22% total deviations under the facts of this case do establish a prima facie case. The limits on tolerable deviations are much lower in a two district case because we need not fear, as the Court did in *Gaffney*, becoming "bogged down in a vast, intractable apportionment slough. . . ." 412 U.S. at 735. If the present plan violates the Constitution, we need not redraw any district lines and try almost countless possible variations of a state-wide apportionment map to find the ideal plan. To reduce the inequality present in the Board's recent 9-6 formula and reflect most accurately the present population

ratios, we simply have to modify the 10-6 ratio which has existed since 1973 and make the apportionment 10-7.

To justify the 9-6 apportionment, the Board argues that adding more members would increase the budget by $80,400 per year per additional member. This is not an adequate justification. That amount is not large compared to the total annual county budget of almost one billion dollars, and a small savings cannot justify a dilution of voting rights. *Cf. Mahan v. Howell*, 410 U.S. 315 (1973) (16% maximum deviation justified by the state's desire to respect traditional boundaries).

Also before us is a petition for leave to intervene filed by John H. Stroger, Jr., a minority member of the Board elected from the City of Chicago, seeking to have the Court hold that the present system of electing Commissioners at large from two districts, the city and the areas outside the city, is unconstitutional because it permits minorities to be underrepresented. The intervenor, therefore, asks that the Court order that the two-district at-large arrangement be replaced by single member districts.

It is conceded by all that the issues sought to be raised by the intervenor are separate and distinct from that raised by the motion to amend our 1973 order establishing the 10-6 ratio so as to reflect current population figures. Moreover, the County Board has recently voted down such a proposal. While it is apparently undisputed that minorities are underrepresented both from the City of Chicago and the suburban areas, unless it could be established that the two-district system was intended to discriminate invidiously against a particular minority or minorities, no federal constitutional question would arise. This showing obviously would require substantial discovery and an ultimate trial if a court were to consider the question at all.

It is also conceded that intervention here rests in the sound discretion of the Court. While we have stated to Commissioners both from the city and the suburbs that more equitable minority representation on the Board from

both districts would clearly be desirable, we do not believe that intervention in the present proceeding is appropriate. The question of single representative districts is a subject which should be dealt with separately. Accordingly, the petition for leave to intervene is denied. Hopefully, since both the city and the suburbs will have an opportunity to elect an additional member, the minority representation will increase from the city and at least one minority representative will be elected from the suburbs.

Orders consistent with the foregoing will enter.

/s/Hubert L. Will
United States District Judge

DATED: Dec. 22, 1981

FOOTNOTES

[1] The movants also argue that the relevant numbers are not population figures but should be registered voter figures and that the deviation is, therefore, even greater. There is, however, apparently no precedent for the use of registered voter rather than population figures.

[2] If, when the Census Bureau releases the undercount adjustments, our figures are substantially inaccurate, the movants may be able to challenge the apportionment again. The only adjustments which would help the movants, however, would be if our estimated figure of a 1.9% undercount for whites is substantially lower than actual or our estimated figure of a 7.7% undercount for nonwhites is substantially higher. Based on prior census experience, this appears unlikely.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES W. SUTTON, et al.,
Plaintiffs,

vs.

GEORGE W. DUNNE, STANLEY T. KUSPER, JR., et al.,
Defendants.

No. 73 C 2021

ORDER

This matter having come before the Court on a Motion to Modify the Order of October 11, 1973, heretofore entered by this Honorable Court and the defendants having replied to said Motion and a Petition for Leave to Intervene having been filed on behalf of JOHN H. STROGER, JR.;

IT IS HEREBY ORDERED THAT:

1. The Petition for Leave to Intervene filed on behalf of JOHN H. STROGER, JR. is hereby denied;

2. The Board of Commissioners of Cook County, Illinois, reapportion itself so that commencing with the Board elected on November 2, 1982, the voters of the City of Chicago will elect ten members of the Board and the voters residing in Cook County outside the City of Chicago will elect seven members of the Board;

3. The Board of Commissioners of Cook County, Illinois, shall adopt within 15 days of this date an ordinance so reapportioning the Board for the election to be held on November 2, 1982 and subsequent elections;

4. The filing period for the primary election to be held on Tuesday, March 16, 1982, for the office of the Cook County Board of Commissioners be and is hereby extended from December 28, 1981, to January 11, 1982, at 5:00 p.m;

5. The last day for filing objections to the certificates of nominating or nomination papers for the offices of Cook County Commissioners is hereby extended to Saturday, January 16, 1982; and

6. This Court expressly retains jurisdiction of the matter until such time as the Census Bureau Undercount Adjustment figures are available.

Entered this 23rd day of December, 1981.

/s/Hubert L. Will
United States District Court Judge

APPENDIX A-2

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-1016
JAMES W. SUTTON, et al.,

Plaintiffs,

vs.

GEORGE W. DUNNE, et al.,

Defendants.

CARL R. HANSEN, et al.,
Defendants-Cross-Plaintiffs Appellees,

vs.

GEORGE W. DUNNE, et al.,
Defendants-Cross-Defendants Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 2021—Hubert L. Will, *Judge.*

ARGUED APRIL 6, 1982—DECIDED JUNE 10, 1982

Before BAUER and POSNER, *Circuit Judges*, and GRANT, *Senior District Judge.**

BAUER, *Circuit Judge.* Defendants appeal from the district court order requiring them to increase the size of the Board of Commissioners of Cook County ("Board") from fifteen members, nine elected from Chicago and six from the suburbs, to seventeen members, ten elected from

---

* The Honorable Robert A. Grant, Senior Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

Chicago and seven from the suburbs. Defendants contend that the district court erred in ordering reapportionment because the plaintiffs failed to prove that the Board's fifteen member apportionment plan diluted their voting rights in violation of the fourteenth amendment. We affirm.

I

Plaintiffs originally filed this reapportionment suit in 1973. They alleged that the Board, which then had fifteen members, ten elected from Chicago and five elected from the suburbs, overrepresented Chicago citizens by 4.87% and underrepresented suburban citizens by 4.87%. The district court held that the 9.74% total deviation diluted the voting rights of the suburban voters in violation of the fourteenth amendment. The court ordered the Board to increase its size to sixteen members, ten to be elected from the city and six from the suburbs. The court's reapportionment plan decreased the total deviation to 1.4%, the smallest feasible deviation. *Sutton v. Dunne*, 365 F.Supp. 483 (N.D. Ill. 1973). Defendants did not appeal the district court's 1973 reapportionment order.

On October 15, 1973, the Board adopted an ordinance implementing the district court's reapportionment plan. The 1974 and 1978 Board elections were held on the basis of that ordinance. On November 2, 1981, the Board passed an ordinance decreasing its size to fifteen members, nine to be elected from the city and six from the suburbs. The Board's 1981 apportionment plan was based on Cook County population figures from the 1980 census.

Plaintiffs returned to the district court to obtain modification of the court's 1973 order to reflect 1980 population changes. Plaintiffs requested the court to reject the Board's 1981 plan and order it to increase either to sixteen members, nine to be elected from the city and seven from the suburbs, or to seventeen members, ten to be elected from the city and seven from the suburbs. Using

adjusted raw population figures from the 1980 census,[1] the district court calculated that the Board's 1981 plan created a 2.11% overrepresentation of Chicago citizens and a concomitant 2.11% underrepresentation of suburban citizens. The court held that the plan's 4.22% total deviation violated the fourteenth amendment. The court also rejected the plaintiffs' plan calling for a proposed sixteen member Board because that plan created an unacceptable 3.28% total deviation, with Chicago underrepresented by 1.64% and the suburbs overrepresented by a like amount. The court adopted the plaintiffs' alternate plan and ordered the Board to increase its size to seventeen members, ten to be elected from Chicago and seven from the suburbs. The court found that this apportionment plan would result in a .93% underrepresentation of the suburbs and .93% overrepresentation of the city voters, with a total deviation of 1.86%. *Sutton v. Dunne*, 529 F.Supp. 312 (N.D. Ill. 1981).

---

[1] The district court relied on the following adjusted census figures:

City of Chicago

1980 Population		Adjustment	1980 Adjusted Population
White	1,143,426	1.9%	1,165,151
Nonwhite	1,861,635	7.7%	2,004,980
	3,005,061		3,170,131

Suburban Cook County

1980 Population		Adjustment	1980 Adjusted Population
White	1,988,406	1.9%	2,026,185
Nonwhite	259,723	7.7%	279,720
	2,248,129		2,305,905

Total Cook County 5,476,036

1980 Adjusted Population

City	2,170,131	=	57.89%
Suburban	2,305,905	=	42.11%
	5,476,036		

Sutton v. Dunne, 529 F. Supp. 312, 314-15 (N.D. Ill. 1981). Neither party challenges the accuracy of these figures.

II

Defendants claim that the district court erred in ordering them to adopt plaintiffs' apportionment plan because plaintiffs failed to prove that the 4.22% total deviation in the Board's plan is of a sufficient "size and quality to amount to an invidious discrimination under the Fourteenth Amendment." *Gaffney v. Cummings*, 412 U.S. 735, 741 (1973). Rather, defendants argue, the deviation is *de minimis*, and, therefore, the Board's plan is constitutionally acceptable. Defendants argue in the alternative that, even if the total deviation is not *de minimis*, the Board's plan is still acceptable because the state's policy of maintaining the Board's membership at fifteen is a sufficient justification for the 4.22% deviation.

The Supreme Court has declined to prescribe "any precise constitutional tests" for reviewing courts to use in determining whether a particular apportionment plan passes constitutional muster. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). There is no fixed percentage deviation demarcating the *de minimis* from the unconstitutional, *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969); each deviation must be examined on a case-by-case basis. "What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

Initially, plaintiffs bear the burden of proving that the deviation from population equality is substantial. *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). Once plaintiffs prove a prima facie case of discrimination, the burden shifts to defendants to show either that the deviation is unavoidable, *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), or that the deviation is justified by an attempt to effectuate a rational state policy. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

Although the Supreme Court has approved apportionment plans with a total deviation greater than 4.22%, *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412

U.S. 735 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *Abate v. Mundt*, 403 U.S. 182 (1971), in only two of the cases, *White v. Regester*, 412 U.S. 755 (1973), and *Gaffney v. Cummings*, 412 U.S. 735 (1973), did the Court find that the deviation was *de minimis*. In *White*, the Court held that a total deviation of 9.9% in the state house of representatives was *de minimis*, and in *Gaffney*, the Court held that a maximum deviation of 1.81% in the state senate and a 7.83% deviation in the state house of representatives were *de minimis*. In both cases the Court was examining a population deviation created by a multiple district apportionment plan. In this case, however, we are confronted with an apportionment plan that involves only two districts. Greater "mathematical exactness" between the number of citizens in each district and the number of their representatives is easier to attain when only two voter districts are involved than when multiple districts are involved. Therefore, the 4.22% total deviation in the Board's 1981 plan, although perhaps an insubstantial deviation in a multi-district case, is not *de minimis* in this two district case.[2]

---

[2] Judge Grant chides us in dissent for finding a 4.22 percent deviation substantial though a higher percentage was deemed *de minimis* in *Gaffney v. Cummings*, 412 U.S. 735 (1973). But a deviation can be judged large or small only in relation to the burden of correcting it. *Gaffney* was a conventional reapportionment case where the court was being asked to create election districts—to draw lines. Because of the political and geographical factors that must be accommodated in redistricting, equality of population across districts is unattainable as a practical matter, and deviations that would be substantial in other contexts must be tolerated. But this is not a redistricting case. There are two districts—the city and the suburbs of Cook County. The only question is how many county commissioners shall be elected from each. There are now 16 commissioners in all, and this number cannot be allocated between the two districts without producing overrepresentation in one and underrepresentation in the other to an extent that all agree is intolerable. To rectify this conceded violation of the Constitution, the Board wanted to drop one commissioner and the district court wanted to add one. The district court's solution results in a substantially smaller deviation from equal representation. It does so at the cost of two commissioners' salary, which is truly *de minimis* relative to the budget of the Board. There is no argument that having another commissioner will reduce collegiality or otherwise impair the effective functioning of the

Defendants contend that the Board's plan is constitutionally acceptable even though the 4.22% deviation is substantial because the Board's policy of maintaining its membership at fifteen is a sufficient justification for the deviation. In *Mahan v. Howell*, 410 U.S. 315 (1973), and *Abate v. Mundt*, 403 U.S. 182 (1971), the Supreme Court approved total deviations of 16.4% and 11.9%, respectively, on the ground that the deviations were justified by the state policy of preserving the integrity of political subdivisions and jurisdictional lines. Defendants argue that their dual policies of preserving the historical size of the Board and saving taxpayers the $80,400 per year that each additional member would cost likewise are rational justifications for a substantial deviation from population equality.

Defendants' reliance on *Mahan* and *Abate*, however, is misplaced. In those cases the Court recognized that the state may have a substantial interest in maintaining slightly unequal voting districts in order to provide representation to subdivisions *qua* subdivisions. *Mahan v. Howell*, 410 U.S. at 326; *Abate v. Mundt*, 403 U.S. at 186. The Cook County Board, however, can achieve this goal without deviating from population equality simply by altering its size. The defendants' arguments against making such an alteration are not persuasive. The Board has a total budget of almost $1,000,000,000. While the Board's desire to save taxpayers' $160,800 is laudable, it is not a sufficient justification for maintaining a 4.22% deviation from population equality. Nor is the Board's desire to remain at fifteen members a sufficient justification—especially since the Illinois Constitution recognizes that it may be necessary to increase the Board's size to insure population equality. Section 5(b) of the 1970 Illinois Constitution Transition Schedule provides that "the number of members of the Cook County Board shall be fifteen except that the county

---

[3] (Continued)
Board. In these circumstances we think the district court's solution the proper one, especially against the background of a long history of overrepresentation of city residents in the composition of the Board, a factor emphasized by the district court.

board may increase the number if necessary to comply with apportionment requirements." The district court did not err in finding that the Board's 1981 apportionment plan unconstitutionally diluted Cook County suburban citizens' voting rights.

The district court ordered the Board to increase from fifteen to seventeen members and thereby decrease the total deviation from 4.22% to 1.86%. "We [will] not disapprove a court-imposed minor variation from a State's prescribed figure when that change is shown to be necessary to meet constitutional requirements." *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 199 (1972) (per curiam). The judgment of the district court is AFFIRMED.

GRANT, *Senior District Judge*, dissenting. I am unable to agree with the majority opinion for the following reasons.

It is fundamental that before a federal court may modify an apportionment plan enacted by a state or local governmental entity, there must be a showing that the plan fails to comport with constitutional or statutory requirements. This principle was only recently confirmed by the Supreme Court in *Upham v. Seamon*, _____ U.S. _____, 50 U.S.L.W. 3800, 3801 (1982). It was the judgment of the district court in this case and the majority of this panel that the appellees have adequately made a *prima facie* showing that the original 9-6 composition enacted by the Board of Commissioners of Cook County ("Board") failed to satisfy constitutional requirements.To that I cannot agree.

The only evidence in this case of a constitutional violation is the 4.22% total deviation. There is absolutely nothing in this record to suggest that the Board's 1981 apportionment plan was designed to favor the city population over the suburban. The issue here really comes down to the question as to whether the 4.22% deviation is of sufficient size as to fail to pass constitutional muster. As the majority opinion makes abundantly clear, no single percentage figure has been established as a concrete standard applicable in all cases. Slip op. at 5. Violations of the Fourteenth Amend-

ment do not hinge purely on numerical percentages. Each case must be examined "on the particular circumstances of the case." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

I disagree with the majority that the deviation in this case was not *de minimis*. I interpret their reasoning to be that wherever a deviation can be reduced by modifying the apportionment plan, a *prima facie* showing of a constitutional violation has been made requiring the intervention of the court. I know of no authority for such a broad proposition. Mathematical equality, while certainly desirable and the ultimate objective, is not absolutely required. *See Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) ("We doubt that the Fourteenth Amendement requires repeated displacement of otherwise appropriate state decision-making in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature." *Id.* at 749). The relative ease by which a deviation can be reduced must be balanced against the important federal policy of respecting the Board's reasonable judgment as to the proper and most effective size and make-up of its body. The district court cannot be allowed to simply substitute its own apportionment preferences for those of the Board. In *Upham*, the Supreme Court recently emphasized this consideration by quoting the following passage from *White v. Weiser*, 412 U.S. 783, 795 (1973):

> "From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment. . . Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by

the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'"

50 U.S.L.W. 3800-01. And in *Gaffney*, the Court stated:

Was the Master compelled, as a federal constitutional matter, to come up with a plan with smaller variations than were contained in appellees' plans? And what is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally "better" when measured against a rigid and unyielding population-equality standard.

The point is, that such involvements should never begin. *We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved.*

412 U.S. at 750-51 (emphasis added).

In my opinion the majority has failed to adequately weigh this critical factor. Instead, only the ability to reduce the deviation is examined. In my view that is not enough. This decision fails to give adequate deference to the reasoned and good faith judgment of the Board and represents unjustified and unnecessary meddling by a federal court in the affairs of a local governmental body. While the district court and the majority consider the change in Board composition to be minor, I view it as a significant intrusion upon local governmental operations.

One other point should be briefly noted. Under the majority's reasoning, the question must be asked why stop at a 10-7 Board with a 1.86% deviation. If the Board were increased to 11-8, the deviation would be reduced to zero. Under the majority's position, there is no reason why such action should not now be taken.[1]

For these reasons, I would find the deviation to be *de minimis* and must, therefore, respectfully dissent.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[1] I also disagree with the majority's rejection of the Board's desire to remain at fifteen members as a sufficient justification for support of the 15 member Board. The size of any legislative body is an important element in the efficiency and effectiveness of its operations and the Board possesses every right to use it as a central element in its apportionment plan. Section 5(b) of the 1970 Illinois Constitution Transition Schedule provides that "the number of members . . . *shall be fifteen except* . . ." (emphasis added). The district court and majority change it to effectively read "at any number but no less than fifteen." This change is a serious abuse of the provisions' purpose.

APPENDIX A-3

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 5, 1982

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. ROBERT A. GRANT, Senior District Judge*/

JAMES W. SUTTON, et al.,
Plaintiffs,

No. 82-1016 vs.

GEORGE W. DUNNE, et al.,
Defendants.

CARL R. HANSEN, et al.,
Defendants-Cross-Plaintiffs-
Appellees,

vs.

GEORGE W. DUNNE, et al.,
Defendants-Cross Defendants-
Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 2021
Hubert L. Will, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendants-Cross-Defendants-Appellants George W. Dunne, et al., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

*/ The Honorable Robert A. Grant, Senior Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

Office-Supreme Court, U.S.
FILED
FEB 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-964

In the
Supreme Court of the United States
October Term, 1982

GEORGE W. DUNNE, et al.,
Petitioners,

vs.

CARL R. HANSEN, et al.,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

James T. Ryan
Timothy R. Conway
Greenberger, Krauss & Jacobs,
Chartered
180 North LaSalle Street
Chicago, Illinois 60601
(312) 346-1300
Attorneys for Respondents

February 25, 1983

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS PRESENTED

1. Are there "special and important reasons" for granting certiorari in light of the action taken by the Board of Commissioners of Cook County, Illinois in independently amending, after this Petition was filed, the apportionment ordinance in question to conform with the ruling of the Court of Appeals.

2. Should this Court grant certiorari to determine whether the Court of Appeals and District Court properly applied established law in ruling that a now-amended apportionment ordinance for a two-district county board impermissibly diluted voting rights guaranteed by the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
I. Review of the Narrow Question Presented by the Petition Is Unnecessary in Light of the Board's Amended Ordinance	5
II. The District Court and Court of Appeals Properly Applied Established Law in Apportioning the Two-District County Board	6
CONCLUSION	9
APPENDIX:	
A-1. AMENDED APPORTIONMENT ORDINANCE DATED JANUARY 3, 1983	1a
A-2. RESOLUTION DATED JANUARY 3, 1983	3a
A-3. VETO MESSAGE DATED JANUARY 6, 1983 RE AMENDED APPORTIONMENT ORDINANCE	5a
A-4. VETO MESSAGE DATED JANUARY 6, 1983 RE RESOLUTION	8a
A-5. AMENDED APPORTIONMENT ORDINANCE DATED JANUARY 17, 1983	11a
A-6. RESOLUTION DATED JANUARY 17, 1983	13a
A-7. LETTERS DATED JANUARY 24, 1983 and JANUARY 19, 1983	15a

TABLE OF AUTHORITIES

CASES

PAGE

Gaffney v. *Cummings*, 412 U.S. 735 (1973) 7

Reynolds v. *Sims*, 377 U.S. 533 (1964) 7

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) 1, 5

Sutton v. *Dunne*, 365 F. Supp. 483 (N.D. Ill. 1973) 8

Swann v. *Adams*, 385 U.S. 440 (1967) 5

CONSTITUTIONAL PROVISIONS AND STATUTES

Ill. Const. 1970, Transition Schedule, Sec. 5(b) 8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 82-964

GEORGE W. DUNNE, et al.,

Petitioners,

vs.

CARL R. HANSEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Petitioner George W. Dunne seeks review of a decision on the narrow question of apportioning a two-district county board to satisfy the requirements of the fourteenth amendment, a question that is of "isolated significance" due to events occurring subsequent to the filing of the Petition. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 76 (1955).

STATEMENT OF THE CASE

After the filing of this Petition, the Board of Commissioners of Cook County, Illinois (the "Board") amended its apportionment ordinance in January, 1983 so that it now conforms with the ruling of the Court of Appeals.*

The amended ordinance provides that the Board is to have seventeen Commissioners, ten to be elected by the voters of that part of Cook County located within the City of Chicago (the "city commissioners") and seven to be elected by the voters of that part of Cook County outside the city (the "suburban commissioners"). This is the same 10-7 apportionment ordered by the District Court and upheld by the Court of Appeals.

The amended ordinance was originally enacted on January 3, 1983 and is attached as Appendix A-1. On January 3, 1983, the Board also passed a resolution, attached as Appendix A-2, instructing Richard M. Daley, State's Attorney of Cook County, Illinois, to voluntarily dismiss this Petition on the ground that following the Court of Appeals' affirmance of the District Court, the "continued pursuit of a further appeal of this matter to the United States Supreme Court will cost the County taxpayers thousands of dollars and is not in the best interests of the citizens of the County." (A-2).

The amended ordinance and resolution were passed with fourteen votes in favor and only three negative

---

* Paragraph 3 of the District Court's December 23, 1981 order (Pet., A-1, p. 7a), which required the Board to enact an ordinance implementing a 10-7 apportionment, was stayed by the District Court. (Pet., p. 4). The Board's actions in January, 1983 were thus independent of any court order in this case.

votes, one of which was cast by Board President George W. Dunne ("Dunne"). On January 6, 1983, Dunne, as Board President, vetoed the January 3, 1983 ordinance and resolution. Dunne's veto messages are attached as Appendix A-3 and Appendix A-4.

On January 17, 1983, the Board voted to override Dunne's vetoes and to approve the amended apportionment ordinance and resolution as originally passed. Fourteen votes were cast in favor of overriding the vetoes and only two votes were cast in opposition, one of these by Dunne himself.* The amended ordinance and resolution, dated January 17, 1983, are attached as Appendix A-5 and Appendix A-6, respectively.**

---

* One city commissioner was absent from the January 17, 1983 meeting.

** It should be noted that a seventeen-commissioner Board was elected on November 2, 1982 pursuant to paragraph 2 of the District Court's December 23, 1981 order. (Pet. A-1, p. 7a). All actions of this Board, including the amended ordinance and resolution, are valid regardless of the outcome of any appeal. Moreover, the size of the Board did not affect the outcome of the vote on the amended ordinance and resolution. Because, at most, only three commissioners opposed the amended ordinance and resolution, the number of commissioners supporting these actions was sufficient to override the vetoes, regardless of whether the Board had fifteen or seventeen commissioners. A four-fifths vote of the Board was needed to override the vetoes. With the fifteen-commissioner Board that existed between November 2, 1981 and December 23, 1981, twelve affirmative votes (after deducting three negative votes) would have been sufficient to override the vetoes. With the seventeen-commissioner Board sitting in January, 1983, fourteen affirmative votes (after deducting the three negative votes) were sufficient to override the vetoes.

Although the amended ordinance and resolution were passed by a coalition of the suburban commissioners and seven of the ten city commissioners purportedly represented by the State's Attorney, the State's Attorney has not voluntarily dismissed the Petition. In a letter dated January 24, 1983, which is attached as Appendix A-7, the State's Attorney indicated that he is pursuing the Petition upon Dunne's authorization because a ruling from this Court would "be beneficial and useful to the parties to [this] litigation." (A-7).

REASONS FOR DENYING THE PETITION

I. REVIEW OF THE NARROW QUESTION PRESENTED BY THE PETITION IS UNNECESSARY IN LIGHT OF THE BOARD'S AMENDED ORDINANCE.

In this Petition, Dunne seeks to reverse the 10-7 apportionment ordered by the courts below. The Board's amended ordinance, however, independently adopts a 10-7 plan and thereby eliminates the practical significance of any ruling from this Court. Even if this Court were to grant the Petition and reverse the Court of Appeals, the amended ordinance would apportion the Board 10-7. Any ruling by this Court would therefore be an abstract discussion of the constitutional standards to be applied to a set of non-existent facts. Not only are such advisory opinions to be avoided, but because apportionment questions must be decided on the facts of the particular case, *Swann* v. *Adams*, 385 U.S. 440, 445 (1967), such a discussion would have no precedential value.

The State's Attorney has nevertheless asserted that the Petition should be pursued, despite the Board resolution requiring a voluntary dismissal, because a ruling from this Court may be "beneficial and useful to the parties to [this] litigation." (A-7). This Court, however, has repeatedly stated that it "does not sit to satisfy a scholarly interest" in constitutional issues, "[n]or does it sit for the benefit of the particular litigants." *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

The ruling in *Rice* establishes that under Supreme Court Rule 17, this case is not one appropriate for review upon writ of certiorari. In *Rice,* the Court dismissed, as improvidently granted, a writ of certiorari to review the constitutionality of a state statute that was amended to correct its constitutional defects after suit had been filed. The "corrective legislation" took the case out of that class of "special and important" cases appropriate for this Court's review, as does the Board's amended apportionment ordinance in this case. *Id.* at 73 (citing former Supreme Court Rule 19, now Supreme Court Rule 17).

The Board's amended apportionment ordinance has changed the fact situation underlying this Petition so that this Court in its discretion should deny the Petition.*

II. THE DISTRICT COURT AND COURT OF APPEALS PROPERLY APPLIED ESTABLISHED LAW IN APPORTIONING THE TWO-DISTRICT COUNTY BOARD.

Apart from the effect of the Board's amended ordinance, the narrowness of the question raised in the Petition does not justify a reconsideration of arguments that were properly rejected by the courts below. The District

---

* The Petition can be denied without deciding whether the Board's amended ordinance renders moot the precise question raised by the Petition. In the event that this Court concludes that that question is moot, the entire case should not be vacated, but instead should be remanded to permit further proceedings pursuant to paragraph 6 of the District Court's order, under which the District Court expressly retained jurisdiction "until such time as the Census Bureau Undercount Adjustment figures are available." (Pet., A-1, p. 8a).

Court and Court of Appeals correctly applied this Court's precedents, developed in the context of multiple district apportionment plans, to the peculiar circumstances of the two-district Board.

As the Court of Appeals noted, this Court has consistently "declined to prescribe 'any precise constitutional tests' for reviewing courts to use in determining whether a particular apportionment plan passes constitutional muster." (Pet., A-2, p. 12a, citing *Reynolds* v. *Sims*, 377 U.S. 533, 578 (1964)). Both the District Court and the Court of Appeals recognized that because the Board is elected from two districts whose boundaries are fixed, the "'vast, intractable'" problems involved in evaluating state-wide multiple district plans were not factors to consider. (Pet., A-1, p. 4a, citing *Gaffney* v. *Cummings*, 412 U.S. 735, 750 (1973); Pet., A-2, p. 13a). The evaluation of the Board's apportionment did not involve redrawing district lines "to try almost countless possible variations. . . ." (Pet., A-1, p. 4a). The courts below were therefore correct in finding a *prima facie* equal protection violation in the context of this two-district county board.*

The Petition, however, asserts that the numerical deviations in multiple district cases should be woodenly applied in this case to find only a *de minimis* deviation. This approach is contrary to the principle that apportionment questions depend "on the particular circumstances of the case." *Reynolds* v. *Sims*, 377 U.S. 533, 578 (1964). Further, the purported need to insulate legislatures from

---

* The precise number of legislative bodies in the United States that have two districts is not known, but the absence of reported cases on the apportionment of such bodies indicates that the number is small.

judicial review if deviations are *de minimis* does not apply to this case, in light of the Board's own actions in adopting an apportionment plan that conforms with the ruling below and in passing a resolution that approves the decisions of the District Court and Court of Appeals.

In taking these actions, the Board also acknowledged the correctness of the ruling below that there were no valid justifications for the 9-6 apportionment created by the Board in November, 1981. Whatever significance can be attached to the historical precedent of a fifteen-member board, a precedent broken in 1973 to remedy the fourteenth amendment violation found in *Sutton* v. *Dunne,* 365 F. Supp. 483 (N.D. Ill. 1973), the Board's amended ordinance is an explicit recognition that a 10-7 apportionment is now "necessary to comply with re-apportionment requirements." Ill. Const. 1970, Transition Schedule Sec. 5(b).

The other justification offered for the 9-6 apportionment, the cost of additional commissioners, is as noted by the courts below, unpersuasive in light of the Board's budget of almost one billion dollars and especially unpersuasive now that the Board has expressed its willingness to pay for a seventeen-commissioner board and its unwillingness to incur the expense of prosecuting this Petition. (Pet., A-1, p. 5a; Pet., A-2, p. 14a).

CONCLUSION

The Board's enactment of an amended apportionment ordinance conforming with the ruling of the Court of Appeals has made unnecessary this Court's review of the question raised in the Petition. Further, the rulings below on the narrow question of apportioning a two-district county board are entirely consistent with this Court's decisions and are acknowledged to be correct by the Board itself. For the reasons stated, the Petition should be denied.

Respectfully submitted,

JAMES T. RYAN
TIMOTHY R. CONWAY
GREENBERGER, KRAUSS & JACOBS,
CHARTERED
180 North LaSalle Street
Chicago, Illinois 60601
(312) 346-1300
Attorneys for Respondents

February 25, 1983,

APPENDIX A-1

ORDINANCE

AN ORDINANCE AMENDING AN ORDINANCE IN RELATION TO THE ELECTION OF COUNTY COMMISSIONERS IN COOK COUNTY AND TO FIX THEIR TERM OF OFFICE

Be it enacted by the People of the County of Cook, represented in the Cook County Board:

An Ordinance in Relation to the Election of County Commissioners in Cook County and to Fix Their Term of Office, approved on October 15, 1973, as amended November 2, 1981, is hereby amended as follows:

SECTION 1. ELECTION — TENURE

On the first Tuesday after the first Monday of November, 1982, or such other day as provided by law as General Election Day in the year 1982 and every four years thereafter, there shall be elected by the legal voters of Cook County, *seventeen* County Commissioners who shall hold their respective offices from the first Monday in December following their election, for a term of four years and until their respective successors are elected and qualified. *Ten* Commissioners shall be elected from the City of Chicago by the legal voters of that city and *seven* Commissioners shall be elected from that part of Cook County outside the City of Chicago by the legal voters of that part of Cook County.

SECTION 2. EFFECTIVE DATE

This amendment shall take effect and be in force upon passage.

January 3, 1983

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, STANLEY T. KUSPER, JR County Clerk of Cook County, in the State aforesaid and keeper of the records and files of said Cook County, do hereby certify that the attached is a true and exact copy of an Ordinance approved by the Board of Commissioners of Cook County at their meeting of Monday, January 3, 1983 by the following roll call vote: Ayes: Bowen, Carey Chesrow, Hansen, Hernandez, McDonald, O'Brien, Quinn, Ropa, Siebel, Tuchow, Tyrrell, Vaughan, Woods — 14, Nays: Bieszczat, Stroger, Dunne — 3 Absent: — 0.
all of which appears from the records and files of my office.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said County at my office in the City of Chicago in said County, this Fifteenth day of February A.D. 1983

/s/ Stanley T. Kusper, Jr.
County Clerk

(Seal)

APPENDIX A-2

RESOLUTION

WHEREAS, on November 2, 1982, seventeen members of the County Board were elected — ten by the voters of the City of Chicago and seven by the voters from outside the City of Chicago — pursuant to the 10-7 reapportionment of seats mandated by the United States District Court for the Northern District of Illinois, Eastern Division, in the case of George W. Dunne, et. al. vs. Carl R. Hansen, et al.; and

WHEREAS, in its order of December 23, 1982, the District Court stated that the "9-6 formula . . . . is the least representative of three possible apportionments, while the 10-7 formula is the most representative," and the 10-7 decision was upheld by the United States Court of Appeals for the Seventh Circuit; and

WHEREAS, the State's Attorney filed in the United States Supreme Court a petition for certiorari; and

WHEREAS, the County's continued pursuit of a further appeal of this matter to the United States Supreme Court will cost the County taxpayers thousands of dollars and is not in the best interests of the citizens of the County;

NOW THEREFORE BE IT RESOLVED that the Board hereby directs the State's Attorney to voluntarily dismiss the petition for certiorari filed in the United States Supreme Court in the case of George W. Dunne, et. al. vs. Carl R. Hansen, et. al.

January 3, 1983

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, STANLEY T. KUSPER, JR County Clerk of Cook County, in the State aforesaid and keeper of the records and files of said Cook County, do hereby certify that the attached is a true and exact copy of a Resolution Approved by the Board of Commissioners of Cook County at their meeting of Monday, January 3, 1983 by the following roll call vote: Ayes: Bowen, Carey, Chesrow, Hansen, Hernandez, McDonald, O'Brien, Quinn, Ropa, Siebel, Tuchow, Tyrrell, Vaughan, Woods — 14, Nays: Bieszczat, Stroger, Dunne — 3 Absent: — 0.
all of which appears from the records and files of my office.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said County at my office in the City of Chicago in said County, this Fifteenth day of February A.D. 1983

/s/ Stanley T. Kusper, Jr.
County Clerk

(Seal)

APPENDIX A-3

(Letterhead of)

OFFICE OF THE PRESIDENT
BOARD OF COMMISSIONERS
OF COOK COUNTY, ILLINOIS
CHICAGO
60602

George W. Dunne
President

January 6, 1983

To the Honorable, the Members of the
Board of Commissioners of Cook County

Ladies and Gentlemen:

Pursuant to the power vested in me by the Illinois Revised Statutes, Chapter 34, Section 908, I hereby veto the actions of the Board of Commissioners of Cook County reflected in the attached Ordinance of January 3, 1983, pertaining to the number of Commissioners that is to compose the Cook County Board. I have vetoed this Ordinance in toto for the following reasons:

Article XIV Section 5(b) of the Constitution of the State of Illinois provides that the members of the County Board shall be fifteen. It does not set the number fifteen as a minimum, but mandates it as the number of Commissioners that is to compose the County Board. The only requirement is that the composition of the Board comply with the apportionment requirements between Chicago and the area outside of Chicago. The only reason given in the Constitution for an increase in the number of Commissioners is in order to comply with the apportionment requirement. It is my contention that the nine to six ratio between Chicago and those areas outside Chicago adequately complies with the apportion-

ment requirement. Furthermore, an increase in the membership from fifteen to another arbitrary number, even if it keeps the constitutional required ratio, will cause unnecessary expenses of the taxpayers dollars since each Commissioner costs about one hundred thousand dollars a year. To allow the increase to seventeen Commissioners will cost the taxpayers approximately two hundred thousand dollars a year. Therefore, since an increase in the number of Commissioners is unnecessary and detrimental to the citizens of Cook County, I am compelled to veto this Ordinance.

Respectfully submitted,

/s/ George W. Dunne
George W. Dunne
President

GWD:b

ORDINANCE

(Filed JAN 6 83)

AN ORDINANCE AMENDING AN ORDINANCE IN RELATION TO THE ELECTION OF COUNTY COMMISSIONERS IN COOK COUNTY AND TO FIX THEIR TERM OF OFFICE

Be it enacted by the People of the County of Cook, represented in the Cook County Board:

An Ordinance in Relation to the Election of County Commissioners in Cook County and to Fix Their Term of Office, approved on October 15, 1973, as amended November 2, 1981, is hereby amended as follows:

SECTION 1. ELECTION — TENURE

On the first Tuesday after the first Monday of November, 1982, or such other day as provided by law as General Election Day in the year 1982 and every four years thereafter, there shall be elected by the legal voters of Cook County, *seventeen* County Commissioners who shall hold their respective offices from the first Monday in December following their election, for a term of four years and until their respective successors are elected and qualified. *Ten* Commissioners shall be elected from the City of Chicago by the legal voters of that city and *seven* Commissioners shall be elected from that part of Cook County outside the City of Chicago by the legal voters of that part of Cook County.

SECTION 2. EFFECTIVE DATE

This amendment shall take effect and be in force upon passage.

January 3, 1983

APPENDIX A-4

(Letterhead of)

OFFICE OF THE PRESIDENT
BOARD OF COMMISSIONERS
OF COOK COUNTY, ILLINOIS
CHICAGO
60602

George W. Dunne
President

January 6, 1983

To the Honorable, the Members of the
Board of Commissioners of Cook County

Ladies and Gentlemen:

Pursuant to the powers vested in me by Chapter 34, Section 908 of the Illinois Revised Statutes, I hereby veto the Resolution passed by the Cook County Board of Commissioners on January 6, 1983, pertaining to the dismissal of the petition for certiorari filed in the United States Supreme Court in the case of *George W. Dunne, et al* v. *Carl R. Hansen, et al.*, for the following reason:

At the time the case came before the Court, I, along with other members of the Cook County Board, wanted to keep status quo, and keep the membership at fifteen rather than increase it by two members for two reasons. The changes were unnecessary and costly. Unnecessary because the nine to six ratio between the Chicago area Commissioners and those outside of Chicago was adequately apportioned and complied with the constitutional mandate. Costly because any increase would cost the taxpayers of Cook County approximately one hundred thousand dollars per Commissioner.

To dismiss the petition for certiorari at this point, when we have already spent time and money defending the action, and there is a reasonable chance of a ruling by the Court in favor of a fifteen member Board, thus saving the taxpayers of the County two hundred thousand dollars a year, in the years to come, would be detrimental to the citizens of Cook County. Therefore, I am compelled, to veto this Resolution.

Respectfully submitted,

/s/ George W. Dunne
George W. Dunne
President

GWD:b

RESOLUTION

(Received JAN 6 83)

WHEREAS, on November 2, 1982, seventeen members of the County Board were elected — ten by the voters of the City of Chicago and seven by the voters from outside the City of Chicago — pursuant to the 10-7 reapportionment of seats mandated by the United States District Court for the Northern District of Illinois, Eastern Division, in the case of George W. Dunne, et. al. vs. Carl R. Hansen, et. al.; and

WHEREAS, in its order of December 23, 1982, the District Court stated that the "9-6 formula . . . . is the least representative of three possible apportionments, while the 10-7 formula is the most representative," and the 10-7 decision was upheld by the United States Court of Appeals for the Seventh Circuit; and

WHEREAS, the State's Attorney filed in the United States Supreme Court a petition for certiorari; and

WHEREAS, the County's continued pursuit of a further appeal of this matter to the United States Supreme Court will cost the County taxpayers thousands of dollars and is not in the best interests of the citizens of the County;

NOW THEREFORE BE IT RESOLVED that the Board hereby directs the State's Attorney to voluntarily dismiss the petition for certiorari filed in the United States Supreme Court in the case of George W. Dunne, et al. vs. Carl R. Hansen, et al.

January 3, 1983

APPENDIX A-5

AN ORDINANCE AMENDING AN ORDINANCE IN RELATION TO THE ELECTION OF COUNTY COMMISSIONERS IN COOK COUNTY AND TO FIX THEIR TERM OF OFFICE

Be it enacted by the People of the County of Cook, represented in the Cook County Board:

An Ordinance in Relation to the Election of County Commissioners in Cook County and to Fix Their Term of Office, approved on October 15, 1973, as amended November 2, 1981, is hereby amended as follows:

SECTION 1. ELECTION — TENURE

On the first Tuesday after the first Monday of November, 1982, or such other day as provided by law as General Election Day in the year 1982 and every four years thereafter, there shall be elected by the legal voters of Cook County, *seventeen* County Commissioners who shall hold their respective offices from the first Monday in December following their election, for a term of four years and until their respective successors are elected and qualified. *Ten* Commissioners shall be elected from the City of Chicago by the legal voters of that city and *seven* Commissioners shall be elected from that part of Cook County outside the City of Chicago by the legal voters of that part of Cook County.

SECTION 2. EFFECTIVE DATE

This amendment shall take effect and be in force upon passage.

January 17, 1983

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, STANLEY T. KUSPER, JR County Clerk of Cook County, in the State aforesaid and keeper of the records and files of said Cook County, do hereby certify that the attached is a true and exact copy of an Ordinance Approved and Adopted by the Board of Commissioners of Cook County at their meeting of Monday, January 17, 1983 by the following roll call vote: Ayes: Bowen, Carey, Chesrow, Hansen, Hernandez, McDonald, O'Brien, Quinn, Ropa, Siebel, Tuchow, Tyrrell Vaughan, Woods — 14, Nays: Stroger, Dunne — 2 Absent: Bieszczat —1. all of which appears from the records and files of my office.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said County at my office in the City of Chicago in said County, this Fifteenth day of February A.D. 1983

/s/ Stanley T. Kusper, Jr.
County Clerk

(Seal)

APPENDIX A-6

RESOLUTION

WHEREAS, on November 2, 1982, seventeen members of the County Board were elected — ten by the voters of the City of Chicago and seven by the voters from outside the City of Chicago — pursuant to the 10-7 reapportionment of seats mandated by the United States District Court for the Northern District of Illinois, Eastern Division, in the case of George W. Dunne, et al. vs. Carl R. Hansen, et. al.; and

WHEREAS, in its order of December 23, 1982, the District Court stated that the "9-6 formula . . . is the least representative of three possible apportionments, while the 10-7 formula is the most representative," and the 10-7 decision was upheld by the United States Court of Appeals for the Seventh Circuit; and

WHEREAS, the State's Attorney filed in the United States Supreme Court a petition for certiorari; and

WHEREAS, the County's continued pursuit of a further appeal of this matter to the United States Supreme Court will cost the County taxpayers thousands of dollars and is not in the best interests of the citizens of the County;

NOW THEREFORE BE IT RESOLVED that the Board hereby directs the State's Attorney to voluntarily dismiss the petition for certiorari filed in the United States Supreme Court in the case of George W. Dunne, et. al. vs. Carl R. Hansen, et. al.

January 17, 1983

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, STANLEY T. KUSPER, JR County Clerk of Cook County, in the State aforesaid and keeper of the records and files of said Cook County, do hereby certify that the attached is a true and exact copy of a Resolution Approved and Adopted by the Board of Commissioners of Cook County at their meeting of Monday, January 17, 1983 by the following roll call vote: Ayes: Bowen, Carey, Chesrow, Hansen, Hernandez, McDonald, O'Brien, Quinn, Ropa, Siebel, Tuchow, Tyrrell, Vaughan, Woods — 14, Nays: Stroger, Dunne — 2 Absent Bieszczat — 1. all of which appears from the records and files of my office.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said County at my office in the City of Chicago in said County, this Fifteenth day of February A.D. 1983

/s/ Stanley T. Kusper, Jr.
County Clerk

(Seal)

APPENDIX A-7

OFFICE OF THE STATE'S ATTORNEY
Cook County, Illinois

January 24, 1983

James T. Ryan, Esquire
Greenberger, Krauss & Jacobs
180 North LaSalle St.
Chicago, Illinois 60601

Re: *Dunne* v. *Hansen* -
Supreme Court No. 82-964

Dear Mr. Ryan:

I have your letter of January 19, 1983 wherein you request this office to indicate what steps it intends to take to voluntarily dismiss the above-referenced petition for writ of certiorari. This is to inform you that this office has been advised by the petitioner, President George W. Dunne, to pursue the petition for writ of certiorari because of the important questions which are raised therein.

This office takes the position that the matters presented in the petition for writ of certiorari are not moot and that a determination of them in the Supreme Court would be beneficial and useful to the parties to the above-referenced litigation.

You, of course, may make whatever motions you deem appropriate with regard to the issue of mootness.

Very truly yours,

RICHARD M. DALEY
State's Attorney of Cook County

By: /s/ Richard A. Devine
Richard A. Devine
First Assistant State's Attorney
443-5449

RAD:jk

Law Offices

GREENBERGER, KRAUSS & JACOBS
180 North LaSalle Street
Chicago, Illinois 60601

January 19, 1983
Ms. Iris E. Sholder
Assistant States Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602

Re: Hansen v. Dunne
82-964

Dear Ms. Sholder:

Enclosed please find a copy of the Resolution which was passed by the County Board on January 17, 1983. As you know, the original ordinance was passed by the Board on January 3, 1983 and subsequently vetoed by George Dunne and re-passed over the veto on January 17, 1983 in the form attached. Will you kindly and immediately advise as to what steps you intend to take to voluntarily dismiss the Petition for a Writ of Certiorari. I call your attention to the fact that this action must be initiated well prior to February 7, 1983 which is the extended date upon which my response to the Petition is due.

I would very much appreciate some word from you as to what you intend to do no later than Tuesday, January 25, 1983.

Very truly yours,

James T. Ryan

JTR:cc
Enclosure
cc: Mr. Carl Hansen

Office-Supreme Court, U.S.
FILED
MAR 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-964

In the

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE W. DUNNE, et al.,

Petitioners,

vs.

CARL R. HANSEN, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD M. DALEY,
State's Attorney of
Cook County, Illinois,

500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5440,
Attorney for Petitioners.

JANE CLARK CASEY,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

HENRY A. HAUSER,
Assistant State's Attorney,
Deputy Chief, Civil Actions Bureau,

IRIS E. SHOLDER,
Assistant State's Attorney,

WILLIAM J. HARTE,
111 W. Washington Street,
Chicago, Illinois 60602,
Of Counsel.

The Scheffer Press, Inc.—(312) 263-6850

QUESTION PRESENTED

Pursuant to Rule 22(5) of the United States Supreme Court, Petitioners reply to the argument newly raised in the Respondents' Brief in Opposition, which raises the following question:

Whether an active case and controversy remain where the Cook County Board enacted an apportionment plan in direct response to a judicial order, the validity of which is the subject of this Petition.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-964

GEORGE W. DUNNE, et al.,

Petitioners,

vs.

CARL R. HANSEN, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REASONS FOR GRANTING THE WRIT

AN ACTIVE CASE AND CONTROVERSY REMAIN BECAUSE THE BOARD'S ACTION WAS TAKEN IN DIRECT RESPONSE TO A JUDICIAL ORDER, THE VALIDITY OF WHICH IS THE SUBJECT OF THIS PETITION.

Subsequent to the filing of the Petition for Certiorari in this case, the Cook County Board enacted the apportionment plan ordered by the district court and affirmed by the court of appeals. Respondents erroneously argue that the case is therefore moot. Petitioners maintain that the case presents an active case and controversy, because

the action of the Board, contradicting its own apportionment plan enacted only a year earlier, was taken in direct response to and as a consequence of the very judicial order challenged in the Petition in the instant case.

Indeed, the Board in a related ordinance acknowledged that its action was taken in response to the court's mandate. (Br. Opp. 13a) Even Respondents do not suggest that, but for the court's order, the Board would have adopted this apportionment plan. Consequently, the Board's action does not render moot the challenge to the validity of that order.

Moreover, under the unusual factual circumstances of this case, the Board's action essentially changed nothing. The two additional Commissioners had already been elected in the November, 1982 election, pursuant to the district court's order of January 6, 1982. Recognizing at that time that his decision was subject to review, the court had made provision to avoid the necessity of a special election. It was understood, of course, that the positions of the two additional Commissioners were subject to final review of the district court's plan. The present enactment by the County Board merely finished carrying out the district court's stayed order that an ordinance be enacted. (Pet. 7a-8a) Like the election of the extra Commissioners, it was in practical furtherance of the court's order, and like it, could be rescinded.

In *Chapman* v. *Meier*, 420 U.S. 1, 15 (1975), this Court held that multi-member districts did not constitute established state policy when their existence was mandated by a series of court orders, even if the legislature once briefly adopted such a plan. Similarly, the Cook

County Board's action in response to a judicial order does not qualify the plan as legislatively established, or moot a challenge to the validity of that order.

In fact, the validity of that order is still at issue. As Petitioners urged in the Petition, the district court and court of appeals applied the wrong standard in this Fourteenth Amendment apportionment case, resulting in a dangerous and confusing precedent. Therefore, contrary to Respondents' contention, this case presents neither a narrow nor a moot issue, nor a mere question of a factual determination. The apportionment as now enacted need not be final in Cook County, and other courts need not be faced with a misleading definition of their powers to intervene into local government affairs.

The major case relied upon by Respondents in support of their mootness argument highlights this point. *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955), involved a suit for damages over a contract clause prohibiting burial of anyone but a Caucasian in the subject burial plot. The courts of Iowa upheld the clause as a defense in that case, even though it was otherwise unenforceable. Subsequently, the state passed corrective legislation. The writ of certiorari was dismissed, not because the legislation rendered the case moot, but because there was no possibility of recurrence. Therefore, the case had only "isolated significance." 349 U.S. at 76-77.

The issues in this case are of major significance, both for Cook County and for other governmental units and courts concerned with the body of precedent in apportionment cases. Consequently, there are indeed special and important reasons as described, *supra,* and in the Petition, for granting a writ of certiorari in this case.

CONCLUSION

For the reasons stated in this Petition, petitioners pray that this Honorable Court grant a writ of certiorari to review the decision below.

Respectfully submitted,

RICHARD M. DALEY,
State's Attorney of
Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5440,
Attorney for Petitioners.

JANE CLARK CASEY,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

HENRY A. HAUSER,
Assistant State's Attorney,
Deputy Chief, Civil Actions Bureau,

IRIS E. SHOLDER,
Assistant State's Attorney,

WILLIAM J. HARTE,
111 W. Washington Street,
Chicago, Illinois 60602,
Of Counsel.